

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NEW ENGLAND CARPENTERS HEALTH)
BENEFITS FUND, PIRELLI ARMSTRONG)
RETIREE MEDICAL BENEFITS TRUST;)
TEAMSTERS HEALTH & WELFARE FUND)
OF PHILADELPHIA AND VICINITY;)
PHILADELPHIA FEDERATION OF)
TEACHERS HEALTH AND WELFARE)
FUND; DISTRICT COUNCIL 37, AFSCME -)
HEALTH & SECURITY PLAN; JUNE)
SWAN; BERNARD GORTER, SHELLY)
CAMPBELL and CONSTANCE JORDAN)

Plaintiffs,)

v.)

FIRST DATABANK, INC., a Missouri)
corporation; and McKESSON)
CORPORATION, a Delaware corporation,)

Defendants.)

C.A. No. 1:05-CV-11148-PBS

**CLASS PLAINTIFFS' OPPOSITION TO MCKESSON'S
MOTION FOR A PROTECTIVE ORDER**

I. INTRODUCTION

To support the U&C class claims Plaintiffs served a small group of retail pharmacies (10) with subpoenas. McKesson in blunderbuss fashion then served 37 subpoenas on pharmacies across the nation. McKesson now complains about one request made by Plaintiffs. The disputed request seeks information demonstrating the relationship between AWP and U&C prices and is therefore proper.

II. REQUEST NO. 4 SEEKS INFORMATION CONCERNING THE RELATIONSHIP BETWEEN AWP AND U&C PRICING

Plaintiffs believe that pharmacies tie the price paid by cash payors to the price charged TPPs, which is of course tied to AWP. Support for this comes from McKesson's own documents.

McKesson owns RelayHealth,¹ a subsidiary that processes "almost six billion" claims from "more than 90 percent of US pharmacies" to "over 1,000 payers."² As a result of RelayHealth's critical position in the industry McKesson has access to cash pricing and reimbursement information from the vast majority of pharmacies in the United States. Along with its partner, Rx-Net, McKesson provides a service to its customers, called Auto-Rx, that uses the pricing information gathered by RelayHealth to help McKesson customers set their U&C prices competitively with the major chains or mass merchandizing stores in the same region and to increase third-party reimbursement.³

According to the Rx-Net website, the objective of U&C pricing is to match or beat local competition without undercutting third-party reimbursement levels.⁴ To achieve this, the pricing

¹ http://www.mckesson.com/en_us/McKesson.com/Our+Businesses/RelayHealth/RelayHealth.html.

² <https://www.relayhealth.com/rh/specific/pharmacies/chain/intelligentNetwork.aspx>.

³ www.mckesson.com/static_files/McKesson.com/MPT/Documents/AutoRxNet.pdf (fact sheet on McKesson's website regarding its Auto-Rx service and its alliance with Rx-Net to provide the service). The Auto-Rx demo identifies RelayHealth as the source of its pricing information. <http://www.rx-net-inc.com/rxnet01.htm>.

⁴ <http://www.rx-net-inc.com/html/info-mckesson.htm> ("**9) How do you ensure our pricing will be competitive and maximize our 3rd party reimbursements?** We edit the pricing on Brand and Or Brand and Generics to ensure that your pricing is above the median 3rd party pricing we have for the area. We then use the 3rd party price plus 1%"; **10) What about competitive pricing for higher ranking drugs?** On higher ranking drugs when there is no cash pricing we will use the 3rd party pricing if the gross profit of the brand drug is greater than AWP-10%. . . . If we use the 3rd party price it is multiplied by 101% to achieve the cash price."). The third-party price is set at AWP.

tables generated by Auto-Rx are based on AWP,⁵ and its instructions advise its clients to reset their U&C prices to be current with changes to FDB AWP.⁶ The vast majority of pharmacy purchases are paid through third-party reimbursement.⁷ Because most reimbursement contracts set the cost of brand drugs at the lower of the AWP-based formula or the U&C, pharmacies lose money on their third-party reimbursement contracts if they set the U&C below the available third-party reimbursement formula.⁸ To ensure that their cash prices are competitive but without giving up higher reimbursement rates available through third-party reimbursement, McKesson's Auto-Rx service allows pharmacies to set their U&C prices for each drug at 1% above the average third-party (AWP-based) reimbursement amount for the region.⁹

Because it is in their economic interest to set U&C prices above third-party reimbursement levels so that they do not undercut third-party reimbursement maximums, as McKesson's own documents demonstrate, it stands to reason that pharmacies generally set the U&C prices in relation to AWP.

⁵ <http://www.rx-net-inc.com/html/info-mckesson.htm> (“5) How do you base the Brand drug Pricing? Brand drug pricing is based on the AWP of the most used package size.”); *accord* <http://www.rx-net-inc.com/html/info-other.htm> (service for non-McKesson customers “3) How do you base the Pricing? Brand and Generic drug pricing is based on the AWP.”); and <http://www.rx-net-inc.com/manual.pdf> at 3 (stating the requirement of the service that all prices in the pharmacy's database “must be priced using AWP at the item level.”).

⁶ <http://www.rx-net-inc.com/manual.pdf> at 8; Auto-Serv provides automatic updates; Sure-Rx (for non-McKesson customers) provides three-month AWP/Retail comparison reports. <http://www.rx-net-inc.com/manualsurerx.pdf>.

⁷ *See, e.g.,* <http://www.rx-net-inc.com/html/info-mckesson.htm> (“**11. We only do 20% cash business. How can your system still benefit us?** We have customers with as little as 3% cash that have achieved gross profit increases of 3%. If you have had your Pharmaserv System more than 1 year we will guarantee a gross increase or refund your original deposit.”).

⁸ *See* <http://www.rx-net-inc.com/html/references.htm> (Auto-Rx testimonials noting that Auto-Rx prevents pharmacies from setting U&C prices too low, allowing pharmacies to capture more revenue not only from their cash customers but more importantly from third-party reimbursement.).

⁹ <http://www.rx-net-inc.com/html/info-mckesson.htm>.

RFP No. 4 in Plaintiffs' subpoena seeks information about payments made by pharmacies to TPPs. This information will allow Dr. Hartman to track and analyze changes in those prices in comparison to the AWP and to the cash price. As the documents from McKesson's own subsidiaries indicate, there is a likely relationship between these payments and AWP/U&C. Thus, McKesson is simply wrong when it claims RFP No. 4 does not pertain to the U&C case.

In addition, this information may be useful in analyzing the aggregate damage issue – but this is a spillover benefit and not the reason the RFP was issued.

III. THE THIRD PARTIES CAN NEGOTIATE ANY PROTECTION THEY NEED

Each of the recipients to these subpoenas has sophisticated counsel that can negotiate on their behalf. If these entities produce the information McKesson has no cause to complain.

Dated: February 13, 2008

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on February 13, 2008.

/s/ Steve W. Berman

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